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No. 65

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

CRESCENT EXPRESS LINES, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR MOUNTAIN TRANSIT CORPORATION, INTERVENOR-APPELLEE

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Dated, November 8, 1943.

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Opinion Below

The opinion of the District Court (R. 30-36) is reported in 49 Supp. 92.

Jurisdiction

The jurisdiction of this Court is invoked on direct appeal taken under Section 210 of the Judicial Code, Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat.

220, U. S. C. A. Title 28, Section 47a. The decree of the District Court dismissing the complaint was dated February 27, 1943 and was entered on March 6, 1943 (R. 28). The order allowing appeal was entered on April 16, 1943 (R. 36). On or about May 7, 1943, appellees, the United States of America and Interstate Commerce Commission filed a joint motion to affirm. On or about May 5, 1943, intervenors, Hudson Transit Lines, Inc., and Mountain Transit Corporation filed statements opposing the jurisdiction of this Court and motions to affirm. This Court, on June 7, 1943, postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 170).

Statement of the Case

This is a suit filed by plaintiff to set aside orders of the Interstate Commerce Commission so as to reinstate a prior order. The orders sought to be set aside are: (1) an order dated September 2, 1941 (R. 115-117), awarding to the applicant a certificate of convenience and necessity as described therein and setting aside a previous order dated June 20, 1938 (R. 103), covering the same facts; (2) an order dated March 17, 1942 (R. 142), denying a petition objecting to the order of September 2, 1941; and (3) an order dated July 13, 1942 (R. 158), denying petition filed by applicant against the order issued March 17, 1942.

The order dated September 2, 1941 (R. 115-17), authorized the issuance of a certificate of public convenience and necessity subsequent to further consideration in the pending proceeding before the Commission (Docket No. MC-78980) as follows:

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in

interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only."

The said order also directed that the previous order issued in this proceeding describing the authority to which applicant has been found to be entitled be vacated and set aside.

The pertinent facts in the proceedings are as follows:

Herman Trevax, Jacob Vangrofsky, Murray Galley and Morris Glickman, a partnership doing business as Crescent Mountain Service, filed BMC-A application on February 12, 1936 (R. 43), and on March 26, 1937, filed a BMC-A2 form (R. 46) in which it set forth in detail the type of operation which it conducted and for which it sought authority. (It even went so far as to indicate that because of its operations of sedans, that it was exempt from any and all provisions of the Motor Carrier Act and that the filing of the application should not be deemed a waiver of its rights thereunder.) In the Exhibit A attached thereto (R. 47-48), the applicant claimed that it went from New York City via the George Washington Bridge to Suffern and Wurtsboro, where traffic was distributed to the summer resorts within a radius of 20 miles

from Woodbourne, N. Y. There was annexed (R. 49) a map indicating the New York area and the manner in which the applicant traveled to the area in and Wurtsboro and indicated by a large irregular circle as the area served by it. Attached to the exhibits was a card which read as follows (R. 82):

"7 Passenger Cars
Leaving Daily to All Parts of the Mountains
At Lowest Rates
(a number of places were listed)
From Your Home to Your Hotel
Boarding And Rooming Accommodations if desired.
Please Call to See Us at Our Residence
About Reservations.
CRESCENT MOUNTAIN SERVICE
531 East 169th Street."

There was no claim made for intermediate points below the mountain area.

On May 7, 1938, a compliance order (R. 99) was issued and on June 20, 1938, corrected compliance order (R. 103) was issued which was in conformance with the then existent practice of the Commission. The corrected order is that in the complaint (R. 12). Please note that in accordance with the application this order limited the operating authority in the mountain area to "intermediate and off-route points within 20 miles of Woodbourne", whereas the previous order, which had been vacated or which had been corrected and which had been dated May 7, 1938, had read, "All Intermediate Points" and then "Off-route points: Points and places within 20 miles of Woodbourne." In other words, the Commission, when it issued its compliance order of May 7, 1938, had at first improperly described the intermediate points and then issued its own corrected order of June 20, 1938, which is

the order that the applicant would like to remain in force and effect, to indicate that the intermediate and off-route points were only within 20 miles of Woodbourne.

On June 28, 1938, Exceptions (R. 105) were filed by protestants to the order of June 20, 1938, wherein it was stated, amongst other things: (a) that no regular route operation was operated in the year of 1935; (b) that no business of any kind was done by the applicant or any of its alleged partners at any time at points between New York City and Wurtsboro, N. Y., or the so-called "points in the mountains"; (c) that the applicant or any of its alleged partners did not do any business to all of the points and places within 20 miles of New York; and (d) that the applicant or any of its alleged partners at no time operated between fixed termini.

Prior to the issuance of the compliance, orders, order to show cause had been served upon the partnership applicant to dismiss the application for failure to prosecute (R. 89). An appearance was then made at informal hearings by an attorney representing the applicants (R. 97); the application was referred to the District Office of the Interstate Commerce Commission for further investigation and informal hearing and conference with the applicants. At the informal hearings before a District Supervisor, additional proof of operation, in the form of affidavits and oral statements, were submitted (R. 97). It was based upon the sworn statements in the BMC-A, the BMC-A2, the affidavits, and additional proof that the compliance order of June 20, 1938 was issued. These affidavits were made by persons in support of the application (R. 64 through 76).

In addition to the affidavits as aforementioned, there were submitted the books indicating the manner in which

the partnership conducted this business which were diaries showing reservations for passengers (R. 77-78). At no time was there ever produced any schedules of operations or any proof of operation of a regular route terminal to terminal operation, nor any advertisements, holding outs, leases, or other evidence indicative of such an operation.

Upon all of this proof, the Commission issued the compliance order of June 20, 1938, limiting the applicant's service to points in New York City, on the one hand, and intermediate and off-route points within 20 miles of Woodbourne, on the other, and described a regular route as the method of operating between New York City and the area. Exceptions of protestant being duly filed to the order of June 20, 1938, the Commission then had before it the complete record upon which it would have to make a determination as to the authority which the applicant was entitled to. There never was a dispute as to the facts.

After the filing of the Exceptions by protestants to the order of June 20, 1938, the proceedings were again referred back to the Commission District Office for further informal investigation and on October 31, 1938, District Supervisor D. V. Grant of New York addressed a letter to the applicant's predecessors advising them (R. 121):

> "Upon specific complaint, the finding made by this Commission in the matter of your 'grandfather' rights has been stayed and the application returned to me for further informal investigation and report."

They were requested to be present on December 1, 1938, at which time protestants were also present.

At the informal conference on December 1, 1938, no additional data was submitted over and above that originally given to the Examiner and that data consisted of evidence of sedan movements over irregular routes in a door-to-door service, between points in New York City, on the one hand, and specific points in Sullivan and Ulster Counties, on the other.

While these proceedings were pending, the Commission had before it 58 applications involving the identical territory, type of operation, and the question as to the type of service to be described in any certificate to be issued to the operators of such service. These cases were consolidated by the Commission and were known by it as *Irving Nudelman, Common Carrier, MC-86772, et als.* (22 M.C.C. 277 and 28 M.C.C. 91).

On March 20, 1940, the Commission submitted its report in the *Nudelman et als.* cases. On February 25, 1941, the Commission, Division 5, on reconsideration, submitted its further report in the *Nudelman* cases, wherein they found that applicants were engaged in special seasonal operations as common carriers by motor vehicle of passengers and their baggage, between New York, N. Y., or portions thereof, on the one hand; and Sullivan and Ulster Counties, N. Y., or portions thereof, on the other, over irregular routes through New Jersey, by describing the authority as special operations in nonscheduled door-to-door service, limited to the transportation of not more than 6 passengers in any one vehicle, but not including the driver thereof, and not including children under 10 years of age who do not occupy a seat or seats.

On September 2, 1941, the order (R. 115-117), attacked herein, was issued which merely substituted a description

of applicant's type of service rendered on June 1, 1935, in conformity with the Commission's determination in the *Nudelman* case in the place and stead of its previous description of the type of authority as contained in the order of June 20, 1938 (R. 103) which applicant seeks to have remain in force and effect.

On October 9, 1941, applicant, a corporation succeeding (R. 112) to the interests of the partnership, filed a protest and petition to stay issuance of the certificate authorized in the order of September 2, 1941, wherein they urged that said order was issued without notice (R. 116); that it changed the content of the previous compliance order so as to direct a non-scheduled door-to-door service over irregular routes with vehicles having no more than 6 passengers; and that the real issue was whether the Commission had the right to restrict a carrier to vehicles of the sedan type. This petition was filed 37 days after September 2, 1941, although the order of September 2, 1941, directed that Exceptions thereto by the applicant should be filed within 30 days therefrom.

Said petition requested that the order be vacated and set aside and the compliance order of June 20, 1938, reinstated. No issue was made therein as to the facts, nor was any request contained in this petition. Said petition was denied on March 17, 1942 (R. 131).

On April 3, 1942, applicant filed petition for reconsideration by the entire Commission and/or to reopen and grant a hearing (R. 132). It was repeated therein that no hearings to support the new order were had and that there was no evidence taken to support the change in the order previously issued on June 20, 1938. The said petition went on further to state: "The only evidence in the record is that taken at the ex parte hearing which was sufficient to support the compliance order of June 20, 1938, or

the same would not have been made"; that the restrictions in the order of September 2, 1941, were contrary to statute and that the alleged limitation and restrictions were in violation of Section 208 (a) of the Motor Carrier Act, to the effect that any certificate issued should not restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate as the development of the business and the demands of the public should require. This petition was denied by the entire Commission by its order of July 13, 1942 (R. 158).

Summary of Argument

The appellant's argument consists of six points which could well be summarized in two. Five of these arguments concern themselves with the authority of the Interstate Commerce Commission, pursuant to Section 208 (a) of the Motor Carrier Act, to specify in any certificate issued under Section 206 or 207 of the Act "the service to be rendered" and in so doing whether they may specify a particular type of service to be (a) special operations; (b) limited in a door-to-door service; (c) to irregular routes; (d) to non-scheduled operations; and (e) to the transportation of not more than six passengers in any one vehicle excepting children under ten years of age who do not hold a ticket. The aforementioned could well be one point and the argument that there is no evidence to support the Commission's findings in the order of September 2, 1941, could well be the second point. Appellee therefore urges that (a) the Commission has the power to specify the service rendered as it did herein; and (b) that its findings in the order of September 2, 1941, are supported by substantial evidence.

Statutes Involved

The following sections of the Interstate Commerce Act are pertinent herein:

"Sec. 206. (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicles subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, However, That,* subject to section 210 if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the applica-

tion for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful * * *.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other

than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sec. 208. (a) Any Certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Section 204(a) (6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; * * *

Sec. 205(h). All the provisions of section 17 of part I shall apply to all proceedings under this part.

Sec. 17. (3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

ARGUMENT

POINT I

Pursuant to Section 208 (a) of the Motor Carrier Act, the Commission must specify "the service to be rendered" in any certificate issued under Section 206 or 207 of the Act.

The appellant's arguments, Points one through five, involve the power of the Commission pursuant to Section 208 (a). The appellant in urging its position has attempted to indicate that the Commission has imposed five different restrictions. The Commission, however, did not impose restrictions but in specifying the service to be rendered, as it is required to do under the Act, described in detail the type of service which the applicant's predecessor had been rendering on June 1, 1935, and presumably continuously since.

There is hardly any dispute as to the facts. The Commission, before issuing its order of September 21, 1942, (R. 115), had withheld a determination on the Exceptions of protestants to its previous order of June 20, 1938 (R. 103) because of the pendency before it of the identical question involved in the *Nudelman* case (22 M.C.C. 277 and 28 M.C.C. 91). After its final determination in respect to the particular subject, it made its order attacked herein. We therefore revert to the Commission's own statement of position in respect to its authority as contained in that case.

In the *Nudelman* case (22 M.C.C. 277), the Commission in its first report described the service rendered as "seasonal service for the transportation of passengers and their baggage in 7 passenger sedans between New York City, or portions thereof, on the one hand, and summer resorts in the Catskill Mountains, hereinafter referred to as the Mountains, in Sullivan and Ulster Counties, on the other." It stated further that the type of service rendered was as follows:

> "That generally the applicants operate door-to-door, not over fixed routes, nor between fixed termini, and not on fixed schedules; that they do not pick up or discharge passengers in the State of New Jersey; that the fair paid by each passenger each trip is subject to oral agreement between such passenger and the carrier, and no written contracts are entered into; and that passengers are transported by motor vehicle across State lines upon and over public highways for compensation." (22 M.C.C. 277).

In its report on reconsideration and final determination, 28 M.C.C. 91, 93-95, it stated:

> "Upon further consideration we are of the opinion that our prior construction of Section 208(a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, 'the service to be rendered,' subject to the proviso that we cannot restrict the right of a carrier to 'add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require.' In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach

maximum limitations to the quantity of the service to be furnished. This construction is in line with our decision in *Pittsburgh-Weirton Bus Co., Inc., Com. Car. Application,* 10 M.C.C. 266, wherein we discussed the meaning of the proviso in question. In that case, the issue was presented as to whether that applicant had inaugurated a new operation by increasing its service between 2 points from 1 round trip daily to 250 one-way trips daily. In deciding that question in the negative, we construed the proviso of section 208(a) to mean (page 270):

> This prohibition protects the right of the carrier to expand not only its 'equipment' but also its 'facilities.' The only purpose of such expansion is to enable the carrier *to provide more service,* and this is very clearly indicated by the words 'as the development of the business and the demands of the public shall require.' It follows that 'terms, conditions, or limitations' in the certificate restricting *the service* of the carrier would be wholly inconsistent with this proviso. (Emphasis supplied.[1])

We did not conclude in that case, however, that we were without power to restrict a carrier to the use of certain types of vehicles for the purpose of describing the service to be rendered. What we found was that we have no power to restrict a carrier by the terms of its certificate from expanding the quantity of its service to meet the demands of the public.

With this exception, our power to specify in any certificate we issue the service to be rendered is complete. For instance, in *Schwerling Common Carrier Application,* 23 M.C.C. 459, we required the applicant carrier to maintain a schedule of not less than one round trip per hour during certain

1. In this report, wherever quoted words or phrases are italicized, it is to be understood that such emphasis is supplied.

periods. In other instances we have found it necessary, in order to specify definitely the character of the service to be rendered, to restrict a carrier to the use of certain types of equipment. For example: In *Miller Extension of Operations*, 21 M.M.C. 401 (prior report, 12 M.C.C. 457), the authority granted therein was restricted to liquid petroleum products in tank trucks; in *Myers Common Carrier Application*, 23 M.C.C. 451, authority was restricted to driveaway service; in *Central Truckaway System, Inc., Com. Car. Application*, 19 M.C.C. 713, authority was restricted to truckaway service; in *Parcel Delivery Service, Inc., Contract Carrier Application*,[2] 8 M.C.C. 275, authority was granted to transport packages and parcels of merchandise by motor vehicle 'the equipment being limited to motorcycle traffic cars, with panel bodies'; in *Billy Baker Co., Common Carrier Application*, 24 M.C.C. 805, authority was granted to transport, among other things, cement in dump trucks; and in *Barrows Common Carrier Application*, 19 M.C.C. 179,[3] authority was restricted to the transportation of not more than six passengers per trip. Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles in describing the particular service to be rendered under the authority granted.

Because we have the power to restrict a carrier to the use of certain types of vehicles, in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits."

2. Although this application was later dismissed for reasons not pertinent herein, the same applicant on April 10, 1939, was issued a certificate containing the same restrictions pursuant to *Parcel Delivery Service, Inc., Common Carrier Application*, 13 M.C.C. 15.

3. No exceptions to the order recommended by the joint board in this case were filed, and, not having been stayed or postponed by us, it became effective as our order by operation of law.

By virtue of the determination in the *Nudelman* case the Commission, by its order of September 2, 1941, merely authorized the issuance of an appropriate certificate properly describing the service rendered by plaintiff's predecessors upon the evidence and facts before it. Plaintiff does not dispute or deny the facts and method of operation. It attempts to confuse the issue by stating that the order of September 2, 1941, limits the holder of the certificate to the use of sedans in contravention of that portion of Section 208(a) which permits a carrier to increase or decrease its service as the demands of the business may require. The Commission in the *Nudelman* report, heretofore recited, has fully discussed its position in respect thereto. Simply stated, it merely means that once a certificate is issued, whether it be pursuant to Section 206 or 207 describing the type of service to be rendered, then there shall be no limitation as to the quantity of that type of service.

The Commission must, in the issuance of a certificate, properly distinguish and describe the service to be rendered. Its description of a door-to-door irregular route non-scheduled service limited to the transportation of not more than a certain number of passengers is a proper method of description of type of operations. The question as to differences in types of operations has been passed upon by this Court.

United States v. *Maher*, 307 U. S. 148, 152-153:

> "On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon Section 206 (a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of Section 206 (a) from the requirements

of Section 207. The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and necessity. But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time.' By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established."

Page 155:

"The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiation between operations over the 'route or routes' for which an application under the 'grandfather' clause is made as against operation 'within the territory', Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provisions of Section 208(a) 49 U. S. C. A. #308(a), that 'Any certificate issued under section (306 or 307) 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate.'"

Alton R. Co. v. *United States*, 315 U. S. 15, 23:

"Appellant railroad companies also urge that Fleming should not have been awarded any rights under the 'grandfather' clause in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal. Thus there was evidence that on and since June 1, 1935, Fleming had been in bona fide operation in those states. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission not the courts."

Rochester Telephone Corporation v. *U. S.*, 307 U. S. 125, 138-140:

"While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act in 1906, and the Mann Elkins Act in 1910, the establishment of similar agencies in many states following the lead of New York and Wisconsin, the widespread recognition that these specific instances marked a general movement, made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This court 'ascribed' to the findings of the Commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois Central R.R. v. Interstate

Commerce Commission, 206 U. S. 441, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Recognition of the Commission expertise also led this court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.

"From these general considerations the Court evolved two special doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. 'Interstate Commerce Commission *v.* Illinois Central R. R., 215 U. S. 452, 470, 30 S. Ct. 155, 160, 54 L. Ed. 280; Interstate Commerce Commission *v.* Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

Page 146:

"The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body." Mississippi Valley Bargeline Co. *v.* United States, 292 U. S. 282, 286, 287, 54 S. Ct. 692, 693, 694, 78 L. Ed. 1260; Swayne & Hoyt, Lt. *v.* United States, 300 U. S. 297, 303 et seq., 57 S. Ct. 478, 480, 81 L. Ed. 659.

United States et al. *v.* Carolina Freight Carriers Corp., 315 U. S. 475, 480.

"We think the Commission was justified in the restrictions which it placed on the geographic scope of appellee's operations. Sec. 206 (a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor was 'in bona fide operations as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application and has so operated since that time.' Sec. 208 (a) requires that the certificate specify 'the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate.' It is clear from these provisions that the power of the Commission to authorize future operations within a designated 'territory' rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant cases, it may extend to all points in a part of that area, and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. Alton R. Co. *v.* United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. ——. The act, provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to service a specified area

> is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. McDonald *v.* Thompson, 305 U. S. 263, 266, 59 S. Ct. 176, 178, 83 L. Ed. 164."

Page 483 says:

> "Sec. 206 (a) requires a showing that the applicant or its predecessor, was 'in bona fide operation as a common carrier' on June 1, 1935, and 'since that time'. By #208 (a) the certificate must specify 'the service to be rendered' by the carrier."

The Commission's action in describing the type of service as it has done herein is not an imposition of restrictions or a delimitation of applicant's Grandfather rights. The Commission having found that the service rendered was not that of a regular route terminal to terminal one, properly specified the type of service to be rendered.

POINT II

The order of September 2, 1941, was made after hearings and with ample evidence in support thereof.

Appellant's brief, page 39 under Point VI, states that the lower Court had ruled that the Commission gave notice of a new hearing before it changed the order of June 20, 1938 (R. 29) and that there is nothing to support such a finding. Reference thereto would indicate that finding of fact No. 6 (R. 29) states:

> "Before changing the certificate granted on June 20, 1938 the Commission gave notice to the plaintiff of a new hearing but it did not take any additional evidence to support the order of September 2, 1941."

The protests in the proceedings before the Commission of Hudson Transit Lines (R. 107, 109) and of Mountain Transit Corporation (R. 101, 103) did not specifically ask for any formal hearing, but, as in all Exceptions of that type, requested the opportunity of submitting evidence in respect to the facts stated by them in the event the Commission deemed the same necessary. The lower court's specific finding of fact No. 6 is proper. The fact that the protestants did not submit any proof is not indicative of the fact that the appellant was not afforded the opportunity of a hearing by the Commission. In fact, the applicant's predecessors were present at a further hearing on December 1, 1938 (R. 121), at which time they saw fit not to submit additional data and relied upon the information already in the docket as contained in the transcript of record herein.

It is not necessary for the Commission to order a formal hearing in all instances in respect to the issuance of certificates. Section 207 (a) of the Motor Carrier Act (pages 11-12 herein) requires that a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing, and able to properly perform the service proposed and to conform to the provisions of Part II of the Motor Carrier Act and the requirements, rules and regulations of the Commission thereunder, and, pursuant to Section 206 (a) (pages 10-11 herein), in instances of Grandfather applicants no proof of convenience and necessity need be submitted.

The administration of Part II of the Motor Carrier Act, pursuant to section 204 (a) (6) (page 12 herein) empowers the Commission to make all necessary orders in connection therewith and to prescribe rules, regula-

tions and procedure for such administration. Pursuant to Section 17 (3) (page 13 herein), the Commission is to conduct its proceedings under any provision of law in such manner as will be conducive to the proper dispatch of business and to the ends of justice. The validity of the proceedings are not affected by the failure of the Commission to conduct a formal hearing. The plaintiff was afforded an opportunity to be heard in person and by an attorney.

Morgan v. *U. S.*, 298 U. S. 468, 481-483.

The procedure of the Commission in respect to the issuance of an appropriate order specifying the service rendered did not deprive the plaintiff of an opportunity to be heard. The procedure provides for the filing of appropriate exceptions and an opportunity to state the position of the person claiming to be affected by the issuance of an order. The appellant herein accepted that procedure (R. 116, 132, 158) and it is noteworthy that upon its Exceptions (R. 119) it stated:

> "The real issue is whether the Commission has the right to restrict a carrier to vehicles of the sedan type."

and further under "Conclusion" (R. 120):

> "The order of September 2, 1941, should be vacated and set aside and the order of June 20, 1938, should be reinstated and all proceedings for the issuance of a certificate pursuant to the said order of September 2, 1941, should be withheld."

In other words, the appellant would urge that if the order which it seeks, June 20, 1938 (R. 103), were permitted to remain in force and effect, then the procedure

of the Commission is proper; but if the order of the Commission does not meet with the appellant's satisfaction, then the procedure of the Commission is improper. As has previously been pointed out, the order of June 20, 1938 (R. 103), is descriptive of the service which the applicant was authorized to render and the order of September 2, 1941, based upon the identical evidence, is a correct description of the service which the applicant is authorized to render, and accordingly it is urged that if the order of June 20, 1938, was properly issued, then the order of September 2, 1941, is likewise proper.

The appellant on pages 40-41 of its brief herein misconstrues protestants' Exceptions in the proceedings before the Commission and would intimate that they are more in the form of pleadings in a Court, which pleadings might require submission of evidence or submission of proof in support thereof. The administrative procedure of the Commission, however, does not require the same and accordingly appellant's argument is meaningless.

The opinion of L. HAND, C.J. in the lower Court (R. 31, 35) very pointedly answers the point raised under argument VI:

> "Finally, we can see nothing improper in the procedure adopted by the Commission in changing its decision; it acted upon the same record and after notice to the plaintiff of a new hearing. True, the interval between the orders were long; but the whole subject was new and confused, and the Commission itself was divided in opinion. The plaintiff was deprived of no right, substantial or procedural, and indeed does not even now allege that any other evidence would have changed the result."

CONCLUSION

It is respectfully submitted that this Court having postponed the question of jurisdiction should now grant appellees' motions to affirm the lower Court's determination.

Respectfully submitted,

HENRY P. GOLDSTEIN,
Attorney for Appellee
Mountain Transit Corporation.

Dated, November 8, 1943.

p. 6

SUPREME COURT OF THE UNITED STATES.

No. 65.—October Term, 1943.

Crescent Express Lines, Inc., Appellant, vs. The United States of America, Interstate Commerce Commission, Hudson Transit Lines, Inc., et al.	Appeal from the District Court of the United States for the Southern District of New York.

[December 6, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal brings here for review a judgment of a district court upholding an order of the Interstate Commerce Commission specifying limitations in a certificate proposed to be issued to appellant as a motor carrier.

The order bears the limitations upon its face, as follows:

"The service to be rendered by applicant is authorized by the terms of which that is a part, in interstate or foreign commerce as a 'common' carrier by motor vehicle of passengers and their baggage in special operations in round-trip sightseeing service limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof and not including children under ten years of age who do not occupy a seat or seats during the whole transportation, from June 1st to October 1st, inclusive, over irregular routes, [illegible] between New York, N. Y. and points in Sullivan and Ulster Counties, New York."

Following the enactment of the Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. § 301 *et seq.*, the appellant petitioned for a permanent authority application for a certificate of public convenience and necessity under the grandfather clause of the Act, 49 U. S. C. § 306 a.

It appears from the application and the evidence the appellant's operations began in 1936 when Herman Tenzer [illegible] seven-passenger sedan and began carrying passengers

to summer resorts in the mountains of New York state. Between 1930 and 1933, three others purchased cars, joined Trevax in this business and opened an office in New York. All this was prior to the critical date of June 1, 1935, fixed by § 306(a) to determine the eligibility of applicants for certificates because of their former (grandfather) operation.

The partners advertised "7 Passengers Cars Leaving Daily to All Parts of the Mountains," "From Your Home to Your Hotel." An affidavit stated that the partners would "transport people to hotels located in all roads and by-roads." The owners of several resort hotels stated that the applicant had supplied cars for carrying guests between their hotels and New York City. Former passengers described the convenience of the service and from their descriptions of the trips, it appears that the routes followed were irregular and taken to fit the needs of each passenger. The firm owned no buses of any kind.

On June 20, 1938, the Commission issued an order that it would, on compliance with conditions not here pertinent, grant a certificate authorizing Crescent to operate

"as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive," between New York City and named towns in Sullivan and Ulster Counties, New York, by way of New Jersey.

Protests were filed by several competing carriers, who considered the compliance order too broad. On September 14, 1938, the parties were notified that the objections had been deemed sufficient to warrant referring the case back to the field force for further investigation. An informal hearing, which the applicant did not attend, was held on December 1, 1938.

The Commission then deferred determination of the applicant's rights until the decision of a number of test cases involving carriers performing a similar service. See *Sullivan County Highway Line, Inc., Application*, 21 M. C. C. 717, reconsidered, 30 M. C. C. 133; *Irving Nudelman Application*, 22 M. C. C. 275, reconsidered, 28 M. C. C. 91. In the meantime, the partners sold their business to the present appellant, which was substituted before the Commission by order of October 31, 1940. On Sep-

tember 2, 1941, the second order, providing for a more limited certificate, quoted at the beginning of this opinion, was issued.

(1) Appellant contends that the changes to which it objects in the last order as compared with the earlier were made without proper hearing or evidence. This argument proceeds upon the assumption that the earlier conclusions, as embodied in the 1938 order, endow appellant with something akin to a right to receive ultimately a certificate embodying the terms of the order.[2] However, under § 306 the Commission was directed to issue the certificates to applicants under the grandfather clause without further proof of convenience or necessity and without further proceedings. Its routine practice was to refer the application to its field force for investigation.[3] The applicant appeared before this examiner prior to the first order of the Commission. The compliance order was made upon the application, the supporting affidavits and questionaire. The mass of applications forced this summary procedure.[4] The compliance order gave opportunity to the applicant or other parties in interest to protest its conclusions. The order remains under the control of the Commission. § 321(b). This application was treated in the foregoing manner.

Nothing inimical to the applicant on the protests of its competitors developed from the hearing of December 1, 1938. Applicant protested in writing the order of September 2, 1941, filed a brief in support of its protest and upon the refusal of Division 5 on March 17, 1942, to allow the protest, renewed it before the entire Commission where it was again denied July 13, 1942. At no time has appellant offered to present additional evidence of operations prior to June 1, 1935. It seems plain to us that appellant has been afforded ample opportunity to present its application with all supporting data. In view of these facts, we do not find it necessary to resolve a question as to whether or not appellant had actual notice of the meeting of December 1, 1938.

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[2] These preliminary orders are spoken of as compliance orders. Such a descriptive word is applicable because the orders direct the issue of a certificate in accordance with the terms of the compliance order, if no objection is filed and if the applicant complies with the statutory and regulatory requirements of security for protection of the public, rates, fares, charges and tariffs. 49 U. S. C. §§ 315-317.

[3] 51st Annual Report of the Interstate Commerce Commission, pp. 70-72.

[4] 51st Annual Report of the Interstate Commerce Commission, pp. 67, 68, 71; 55th Annual Report of the Interstate Commerce Commission, p. 110. See Gregg Cartage Co. v. United States, 316 U. S. 74, 84.

(2) A further contention of appellant is that the record "does not support the Commission in restricting the appellant to door-to-door service over irregular routes in non-scheduled operations," which were described as special operations. As the district court's interpretation of the order, that "door-to-door service" allowed the appellant to transport passengers from their office or station in the city as well as from the passengers' residences to the mountains and vice versa, is not challenged, that provision requires no further examination. Evidently from the advertisement quoted on page 2, both of these types of business were sought.

The objection of appellants to "irregular routes" appears to be that only special or charter operations entitle a motor carrier to a certificate for irregular routes. § 307. Therefore, if appellant's operations are scheduled operations between fixed termini as appellant also contends, the order ought to require a regular route. However, we think the evidence is clear that prior to the critical date, June 1, 1935, the operations of appellant were special and non-scheduled. Consequently the insertion of the privilege for irregular routes was correct.

In answer to the inquiry as to whether special or charter operations were conducted prior to June 1, 1935, appellant answered, "no special operations."[5] However, the record shows a number of instances where passengers made individual arrangements for their transportation to and from the mountains. No schedule of arrival or departure appears in the record. Instead of publishing arrivals and departures, routes, stops, et cetera, the advertisements referred to daily trips and asked prospective customers to arrange for reservations. There was convincing evidence that applicant's service prior to June 1, 1935, was special and non-scheduled.

The evidence also is plain that the appellant did not operate between fixed termini. A map was filed with the application showing not a single destination in the mountains but numerous ones, which are described by appellant in its application as follows:

"Applicant obtains its traffic in the Boroughs of Manhattan and Bronx, New York, and transports said traffic to the Counties

[5] The Commission construes "charter" to refer to one contractor taking over all the vehicle for a trip or trips and "special" to transportation services on week-end, holidays or other special occasions when the carrier assembles the passengers and sells individual tickets. Re Fordham Bus Corp., 29 M. C. C. 293, 297, 41 F. Supp. 712.

of Sullivan and Ulster, in the State of New York. On return trips the applicant obtains its traffic in and about Woodbourne, New York, more specifically within a radius of twenty (20) miles from Woodbourne, New York, and transports such traffic to the five boroughs of New York City."

(3) Finally, appellant urges that it is beyond the power of the Commission to limit its operations to "transportation of not more than six passengers in any one vehicle." The freedom is claimed to use buses or other multiple passenger type of conveyance.

Section 208 of the Act, 49 Stat. 543, 552, 49 U. S. C. § 308, provides, with reference to grandfather clause carriers,

"That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."[6]

The scope of the Commission's authority under this section depends upon the meaning given to the word "business." The appellant argues that it would be engaged in the same business if, in lieu of using seven-passenger sedans, it undertook to haul larger numbers of passengers in buses. But the special advantage to the public inherent in the use of small vehicles operating as occasion demands from door-to-door rather than between terminals, sets off the appellant's business from the service provided by regular lines operating heavier equipment. *Irving Nudelman Application*, 28 M. C. C. 91, 95-6. The limitation to six passengers in one load is less restrictive than limitation to a particular type of vehicle since it allows the carrier to employ sedans, open cars, station wagons, or any other suitable motor vehicle. 28 M. C. C. at 96. This allows flexibility in equipment while continuing the same business. 22 M. C. C. 285. The line between six passenger and larger scale operation must be drawn somewhere, and the Commission has fixed it where the appellant con-

[6] The bill as drafted by the Federal Coordinator of Transportation did not contain the proviso. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 47 and 357. The addition was explained by Senator Wheeler, the Chairman of the Interstate Commerce Committee, as follows: "Section 208(a), page 26, as amended, permits the Commission to attach to all certificates, whether granted under the grandfather clause or otherwise, reasonable terms, conditions, and limitations. In order to meet criticisms that the effect of these provisions would be to check the natural growth of operations if every increase in facilities required authorization by the Commission, the committee has amended section 208(a) . . . ." 79 Cong. Rec. 5654.

ducted its business on June 1, 1935. The Crescent partnership gave some indication that it appreciated these special differences when in 1938 it proposed to change its name to Crescent Cadillac Service, "for the sake of a better business name," thus emphasizing the commercial significance of the sedan-type vehicle. It appears from the application that Crescent owned no buses; it operated nothing but sedans. To authorize the appellant to change to the business of carrying passengers by bus would alter the position in the transportation system which it occupied on July 1, 1935. *Noble* v. *United States*, 319 U. S. 88.[7]

If the holder of a grandfather certificate for this distinctive door-to-door service could develop his operations so that they would be substantially those of a bus line, the ability of the Commission to carry out its duties of regulation in the public interest would be seriously impaired. Since § 308 requires the Commission to specify the service to be rendered, this could not be done without power also to specify the general type of vehicle to be used. We agree with the Commission that the proviso is a prohibition against a limitation on the addition of more vehicles of the authorized type not a prohibition of the specification of the type. See *Irving Nudelman Application*, 28 M. C. C. 91.[8]

We are of the view that the power of the Commission to limit the certificate as it proposes to do is in accord with the purposes of the Motor Carrier Act. When Congress provided for certificates to cover all carriers which were already in operation, it did not throw open the motor transportation system to more destructive competition than that already existing. The right to certificates was limited to those then in bona fide operation "over the route or routes or within the territory for which application is made." 49 U. S. C. § 306.

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[7] The Noble case was a contract carrier application under 49 U. S. C. § 309. Under subsection (b) the Commission was required to specify in the permit the "business of the contract carrier covered thereby."

We held that it was proper to limit the permit so that only shippers who "operate food canneries or meat packing businesses," in particular localities, might be served. This limitation corresponded to the type of trade previously enjoyed by the carrier. The carrier contended for a limitation only as to commodities. The proviso in § 309(b), applicable in the Noble case, covers substantially the same ground as the proviso in § 308 dealt with in the present opinion.

[8] Numerous instances of limitation of type are given in the Nudelman opinion. The rule of the Nudleman case has been applied in Rubin and Greenfield Application, 33 M. C. C. 383, and Greenberg Application, 33 M. C. C. 725. See also Davidson Transfer and Storage Co. Application, 32 M. C. C. 777.

The statute, we have said, contemplated "substantial parity" between future and prior operations. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22. "As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms." *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage Co.* v. *United States*, 316 U. S. 74, 83. Consequently we held in *United States* v. *Maher*, 307 U. S. 148, that operations over irregular routes did not provide the requisite continuity to support an application for regular service between fixed termini, even when the highway between the fixed termini had been occasionally used for part of the distance in the irregular route operations.

When the Commission requires the applicant under the grandfather clause to limit its future operations to the type of equipment and service previously offered, it acts within its power and in accord with the purpose of Congress to maintain motor transportation facilities appropriate to the needs of the public. S. Rep. No. 482, 74th Cong., 1st Sess. If there is a need for a different type of service for this transportation, applications may be filed under § 307.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.